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Medicaid

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A. Overview

Medicaid is a joint state and federal program in which all states participate. The federal government gives money to the states but sets certain general guidelines by which the states must abide. Each state's rules must be approved by the federal government and therefore can vary from state to state. See for example: LSA- R.S. 46:446[i] (purportedly allows Medicaid full recovery); and Fla. Statute 409.910(11)(f)[ii] (which provides that after attorney's fees—calculated at twenty-five percent of the judgment or settlement—and costs are deducted, one-half of the remaining recovery shall be paid to [Medicaid] up to the total amount of medical assistance provided). To get a good understanding of the Medicaid collection rights and remedies, see ***Arkansas Department of Health and Human Resources v. Ahlborn*****,** 547 U.S. 268 (2006)[iii], discussed at length herein.

B. Medicaid's recovery rights in third-party tort claims.

The federal statutory scheme is found at 42 USC §1396(a)(25)(A)[iv] and the regulations are found at 42 CFR § §433[v] et seq. There was a split in the circuits and state cases as to the extent to which Medicaid had a right to participate in a third-party claim. ***Ahlborn***, supra, clarified the rules.

Example of pre-***Ahlborn*** case law: ***Copeland et al. v Toyota***, U.S. App. 10th Cir, (1999), 136 F. 3rd 1249[vi]**.** In the ***Copeland*** case, the Court of Appeals ruled that Medicaid did not have to reduce its recovery rights because of the low settlement. Therefore, the Kansas Department of Social and Rehabilitative Services received 100% of medical expanses incurred: $136,737.35. The injured plaintiff received $2,665.46.

In ***Ahlborn,*** supra., the court settled this issue and discussed several others. The Arkansas Department of Health and Human Services (ADHS) paid $215,645.30 for treatment rendered to Ahlborn following an accident which allegedly caused Ahlborn personal injuries. Ahlborn sued a third party to recover compensatory damages resulting from the accident. Ahlborn settled the third-party case for $550,000. ADHS was not made a party to the original suit nor notified of the suit. However, sometime after suit was filed, ADHS intervened. Settlement discussions between the plaintiff and defendant took place and, as the Supreme Court noted, "ADHS did not participate or ask to participate in settlement negotiations. Nor did it seek to reopen the judgment after the case had been dismissed". After the settlement, ADHS asserted a lien against Ahlborn's settlement for the full amount of Medicaid benefits provided (i.e., $215,645.30).

Ahlborn sued in federal court, arguing that ADHS can only recover that portion of the settlement representing payment for past medical expenses. The sole issue in the case was one of statutory construction: whether federal Medicaid statutes, which provide for the assignment of rights to third-party payments, but prohibit placing a lien on a Medicaid recipient's property, limit ADHS's recovery to the portion of the settlement for medical expenses. (42USC §1396k)[vii]. The U.S. Supreme Court affirmed the decision by the U.S. 8th Circuit Court of Appeals holding ADHS was entitled only to that portion of the judgment representing payment for medical expenses.

The parties stipulated that an estimate of Ahlborn's total damages was $3,040,708.12 and agreed that ADHS would recover $215,645.30 if it prevailed on the statutory construction issue, but only $35,581.47 if Ahlborn prevailed. The district court granted summary judgment for ADHS. The Eighth Circuit Court of Appeals reversed, holding that Ahlborn's right to a settlement that may be received from a third party, which the Arkansas statute required her to assign to the ADHS, was her "property"; that the federal anti-lien statute is intended to protect all of Ahlborn's non-assigned property from recovery by ADHS; and finally that the Arkansas statutes were invalid to the extent that they required Ahlborn to assign her rights to recover third-party liability payments for matters other than the cost of her medical care and services.

After setting out the basics of the Medicaid/state relationships**,** the court noted:

> "The crux of the parties' dispute lies in their competing constructions of the federal Medicaid laws. The Medicaid

program, which provides joint federal and state funding of medical care for individuals who cannot afford to pay their own medical costs, was launched in 1965 with the enactment of Title XIX of the Social Security Act (SSA), as added 79 Stat. 343, 42 U. S. C. §1396 et seq. (2000 ed. and Supp. III). Its administration is entrusted to the Secretary of Health and Human Services (HHS), who in turn exercises his authority through the Centers for Medicare and Medicaid Services (CMS).

States are not required to participate in Medicaid, but all of them do. The program is a cooperative one; the Federal Government pays between 50% and 83% of the costs the State incurs for patient care, and, in return, the State pays its portion of the costs and complies with certain statutory requirements for making eligibility determinations, collecting and maintaining information, and administering the program. See §1396a.

One such requirement is that the state agency in charge of Medicaid (here, ADHS) 'take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the plan' §1396a(a)(25)(A) (2000 ed.).

'In any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability.' §1396a(a)(25)(B).

'To facilitate its reimbursement from liable third parties… 'to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such healthcare items or services.' §1396a(a)(25)(H).

'The obligation to enact assignment laws is reiterated in another provision of the SSA, which reads as follows:

> '(a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this subchapter, a State plan for medical assistance shall—
>
> > '(1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required—
> >
> > > '(A) to assign the State any rights . . . to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party;
> > >
> > > '(B) to cooperate with the State . . . in obtaining support and payments (described in paragraph (A)) for himself . . . ; and

> '(C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan . . .' §1396k(a)."

C. The short version of Ahlborn

The short version of the Ahlborn case, including the stipulations of the parties and decision of the U.S. Supreme Court is:

- ADHS paid approximately $215,645.30 on behalf of the plaintiff, Ahlborn;
- Ahlborn settled the case for $550,000.00 with the third-party defendant;
- ADHS and Ahlborn stipulated that the value of Ahlborn's case, without problems, was approximately $**3,040,708.12**;
- The plaintiff therefore settled for approximately 1/6th of the value of the case;
- Therefore, ADHS was entitled to 1/6th the amount of its payments, or approximately $35,581.47 ($215,645.30/6 = $35,581.47). The math used by the parties is not exactly correct but close enough for a good understanding of its methodology.

D. Other pertinent issues raised by the Supreme Court:

A. If the parties do not stipulate as to the values as they did in *Ahlborn*, how can the issues be determined?

The Supreme Court, in footnote 9, stated:

"The effect of the stipulation is the same as if a trial judge had found that Ahlborn's damages amounted to $3,040,708.12 (of which $215,645.30 was for medical expenses), but because of her contributory negligence, she could only recover one-sixth of those damages."

By this statement the Court seems to take into consideration the realities of settlements and judgments: that all cases involve risk for all sides and are therefore settled on the basis of risk analysis, either formal or intuitive. Further, even when tried the prevailing plaintiff(s) may not receive full reimbursement of Medicaid funded medical expenses.

B. That there is a major difference between the "lien" and "assignment".

Federal law, with certain exceptions not relevant to this discussion, prevents the states from imposing a lien on the Medicaid recipient's property, 42 U.S.C.§§1396a(a)(18)[viii] and 1396p.

"That the lien is also called an 'assignment' does not alter the analysis. The terms that Arkansas employs to describe the

mechanism by which it lays claim to the settlement proceeds do not, by themselves, tell us whether the statute violates the anti-lien provision. …Although denominated as an 'assignment,' the effect of the statute here was not to divest Ahlborn of all her property interest; instead, Ahlborn retained the right to sue for medical care payments and the State asserted a right to the fruits of that suit once they materialized. In effect, and as at least some of the statutory language recognizes, Arkansas has imposed a lien on Ahlborn's property. Since none of the federal third-party liability provisions excepts that lien from operation of the anti-lien provision, its imposition violates federal law." (citations omitted)

C. Whether the plaintiff/recipient must cooperate with Medicaid is questionable.

The Court said:

"ADHS…urge that even if a lien on more than medical damages would violate the federal law in some cases, a rule permitting such a lien ought to apply here either because Ahlborn breached her duty to 'cooperate' with ADHS or there is inherent danger of manipulation in cases where the parties to a tort case settle without judicial oversight or input from the State. Neither argument is persuasive.

"The United States proposes a default rule of full reimbursement whenever the recipient breaches her duty to 'cooperate,' and asserts that Ahlborn in fact breached that duty. But, even if the

Government's allegations of obstruction were supported by the record, its conception of the duty to cooperate strays far beyond the text of the statute and the relevant regulations. The duty to cooperate arises principally, if not exclusively, in proceedings initiated by the State to recover from third parties. See 42 U. S. C. §1396k(a)(1)(C) (recipients must 'cooperate with the State in identifying . . . and providing information to assist the State in pursuing' third parties). Most of the accompanying federal regulations simply echo this basic duty; all they add is that the recipient must '[p]ay to the agency any support or medical care funds received that are covered by the assignment of rights.' 42 CFR §433.147(b)(4) (2005)"[ix]

D. Is the methodology of *Ahlborn* the only method to come to a figure as to the amount of the reimbursement due Medicaid?

The Supreme Court further observed:

"As one amicus observes, some States have adopted special rules and procedures for allocating tort settlements in circumstances where, for example, private insurers' rights to recovery are at issue. See Brief for Association of Trial Lawyers of America 20–21. Although we express no view on the matter, we leave open the possibility that such rules and procedures might be employed to meet concerns about settlement manipulation."

Query: If the state receives an assignment of the Medicaid recipient's rights and nothing else, can Medicaid have any greater rights than the recipient and are there any other potential hurdles and/or pitfalls? For example:

- Is the recipient the real party in interest?
- Does the local statute of limitations pertain to Medicaid?
- Can the defendant assert all defenses personal to the recipient?

It seems as though the Supreme Court's strict interpretation may have broad consequences.

IV

Louisiana Medicaid

A. The Louisiana Rules of Professional Conduct[x]

Rule 1.15 – Safekeeping of Property Amended effective April 1, 2008:

> • (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge, and shall be limited to a statutory lien or privilege, a final judgment addressing disposition of those funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property. Except as stated in this rule or otherwise

permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

B. Overview

Pursuant to the above federal statutory scheme, the Louisiana Department of Health and Hospitals (DHH) has a right to enforce the rights of assignment which it acquires from the recipient of medical services in third-party liability cases pursuant to LA R.S. 46: 153(E)[xi], 46:446[xii], 446.1 and 446.2.

Louisiana R.S. 46:153 states in part:

Medical assistance; estate recovery program

E. By applying for, and subsequently becoming eligible to receive, or by accepting medical assistance under provisions of this Section, the applicant or recipient shall be deemed to have made an **assignment** to the department of his right to any hospitalization, accident, medical, or health benefits owed to applicant or recipient by any third party, as well as rights to such benefits or medical support payments owed by any third party to applicant's or recipient's children or any other person for whom applicant or recipient has legal authority to execute such an assignment.

The important point to remember is that Medicaid has a statutory assignment and must be notified of a third-party claim when Medicaid has provided benefits:

- DHH has a cause of action against the plaintiff(s) and defendant(s) and can intervene in a suit;
- DHH is to be served with a copy of the suit;
- DHH is not necessarily bound by any settlement but is bound by the dictates of federal law and the U.S. Supreme Court's decision in *Ahlborn*, supra.
- Its notarized statement of account is prima facie evidence of correctness of account.

Louisiana R.S. 46:446 states in part:

> F. The Department of Health and Hospitals shall have a privilege for the medical assistance payments made by the department on behalf of an injured or ill Medicaid recipient on the amount payable to the injured recipient, his heirs, or legal representatives out of the total amount of any recovery or sum had, collected, or to be collected, whether by judgment or by settlement or compromise, from another person on account of such injuries, and on the amount payable by any insurance company under any contract providing for indemnity or compensation to the injured person. The privilege of an

attorney shall have precedence over the privilege created under this Section.

Query: Is this statute in compliance with the federal statutes?

C. A Louisiana Court of Appeals' application of *Ahlborn*.

The only case in Louisiana thus far is ***Weaver v. Malinda***[xiii], No. 07-CA-708, La. App. 5th cir (2/19/2008), 980 So. 2nd 55. In *Weaver*, the plaintiff sued the defendant for damages resulting from a motor vehicle accident. The Louisiana Department of Health and Human Services (DHH), which had paid $64,000+ in medical expenses, attempted to recover its payment. The plaintiff and defendant settled via a consent judgment:

> "Pursuant to the consent judgment, in compromise of her claim Thornton accepted $180,000.00, comprising $163,650.00 general damages and $16,350.00 medical special damages, representing 25% comparative fault on the part of all defendants."

In other words the parties agreed that plaintiff was settling for 25% of the value of the case. Thereafter, the plaintiff (Thornton) filed a concursus proceeding to establish the amount to which DHH was entitled. (Plaintiff did not argue that DHH did not have a right to recover anything; the question was the amount.) The trial court ruled that DHH was entitled to 25% of its total (i.e., $16,000.00).

DHH tried to distinguish *Weaver* from *Ahlborn* arguing that in *Ahlborn* the parties stipulated the total value of the case, whereas in *Weaver:*

> "DHH did not stipulate either to the value of Thornton's case or to the amount to which DHH would be entitled if it could not place a lien on Thornton's settlement. Instead, Thornton pursued her settlement without involvement of DHH, and on August 24, 2006 DHH received a copy of Thornton's settlement agreement showing a lump sum settlement of $180,000 with no apportionment as to categories of damages**."**
>
> Further, DHH argued:
>
> "Thornton effectively prevented DHH from participating in her lawsuit and exercising its statutory rights against the liable third parties...." Appellant's Brief, p. 7. Hence, DHH contends, Thornton cannot now enter into a consent judgment with the defendants to avoid reimbursing DHH for her medical expenses."

The appellate court affirmed the trial court's granting a motion for summary judgment finding that DHH was entitled to 25% of its total payment. **<u>However, there is a caveat</u>**: the court ruled that since the matter before it was a concursus proceeding, the only issue was the distribution of the proceeds. In the trial court, DHH did not argue that it was entitled to any more from either the plaintiff or the attorney for

preventing DHH from asserting its privilege and objecting to the valuation in the settlement documents.

Therefore, in *Weaver* the court left open the issue of whether DHH can assert its entire claim if it is not properly served with the petition. However, Ahlborn seemed to say the recipient does not need to cooperate in DHH's intervention efforts—only if DHH is pursuing the claim directly. We believe that defendants are not going to risk having a contingent liability on its books. Therefore defendants will demand Medicaid's participation so all claims are if fact settled when a payment is made. Therefore it is our belief that all attorneys in a case should take heed and follow the statutory scheme and serve DHH when it has made payments on behalf of an injured plaintiff. *Ahlborn*, supra, peripherally touched on this issue but didn't specifically state that the recipient must cooperate with Medicaid while the recipient is pursuing his/her claim.

D. Medicaid Contact Information

Currently, the chief Medicaid third-party collection attorney is:
Mr. Weldon Hill
P.O. Box 3836
Baton Rouge, LA 70802
Ph. (225) 342-1107

Note the attached document giving the current contact information of claims personnel and attorneys for DHH.

E. Is balance billing by a Medicaid provider allowed?

A medical provider that accepts Medicaid payments for treatment of an injured plaintiff cannot engage in balance billing. In other words, the medical provider that accepts Medicaid is compelled to accept the Medicaid-allowed amount as full payment.

In ***Miller v. Gorski Wladyslaw Estate***[xiv] No. 07-30378. Oct. 23, 2008, 547 F.3d 273, C.A.5 (La.), the plaintiff was brought to the Baton Rouge General Hospital under emergency conditions. Subsequent to admission, the plaintiff became Medicaid eligible. However BRGH did not accept Medicaid and argued it was entitled to the full amount of its invoice. The court allowed BRGH to recover its entire amount of its invoice, without Medicaid mandated reductions, because it did not accept Medicaid payments. In dicta the U.S. Fifth Circuit went to great lengths to explain the Medicaid system. The court stated:

> **"**What Medicaid does not allow is for a provider who accepts Medicaid coverage for a patient to recover more than the program's reimbursement rates for care. *See 42 CFR §447.15".*

Miller appears to be the only current case on the point. *Miller* is not interesting reading but it is instructive as to the rights of the Medicaid provider. Note that if a medical provider does not accept Medicaid, it has its state-allowed statutory lien rights pursuant to La. R.S. 9:4752[xv], et seq.

F. Does Medicaid have a right to demand funding of future Medicaid case-related expenses?

As far as we can tell there are no federal statutes or rules that allow for set-asides or funding of future Medicaid case-related expenses. To the contrary, the federal enabling statute seems specific that Medicaid is entitled to an assignment from the recipient of funds already paid.

In summary, Medicaid has a statutory recovery rights, but its right to collect the full amount of the amounts already paid is always questionable.

G. Plaintiffs' counsel beware!

The proceeds from a personal injury claim may be sufficient to disqualify a plaintiff from Medicaid and/or SSDI benefits. The eligibility thresholds are low and too complex to discuss in the article; for a more complete discussion the article entitled "Protecting Your Clients and Yourself with Special Needs Trusts" by Pete Losavio, of Losavio & DeJean LLC (Around the Bar, 5/2008), is attached. It is incumbent on plaintiffs' counsel to protect their clients from becoming ineligible. A special needs trust (aka supplemental needs trust) pursuant to 42 U.S.C. 1396 p (d) (4)[xvi] seems to be the only solution.

H. FYI: Medicaid is not a collateral source

Therefore the plaintiff cannot collect the Medicaid mandated write down**. See *Bozeman v. State*[xvii]**, 03-1016, p. 9 (La. 7/2/04), 879 So.2d 692.

[i] http://www.legis.state.la.us/lss/lss.asp?doc=100886

[ii] http://www.leg.state.fl.us/STATUTES/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0409/Sec910.HTM

[iii] http://www.supremecourtus.gov/opinions/05pdf/04-1506.pdf

[iv] http://www4.law.cornell.edu/uscode/42/1396a.html

[v] http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=e6b92b7c83c363d592a113942332b867&rgn=div8&view=text&node=42:4.0.1.1.4.1.21.8&idno=42

[vi] http://ca10.washburnlaw.edu/cases/1998/02/96-3181.htm

[vii] http://www.law.cornell.edu/uscode/42/usc_sec_42_00001396---k000-.html

[ix] http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=ba993340b3f21ee4d273213310dfa955&tpl=/ecfrbrowse/Title42/42cfr411_main_02.tpl

[x] http://www.ladb.org/Publications/ropc2006-04-01.pdf

[xi] http://www.legis.state.la.us/lss/lss.asp?doc=100349

[xii] http://www.legis.state.la.us/lss/lss.asp?doc=100886

[xiii] http://www.fifthcircuit.org/PDF/OPINIONS/PO/2008/0C4BA518-5D07-47C7-B876-F5FD500F45C2.pdf

[xiv] http://www.ca5.uscourts.gov:8081/isysquery/irl4791/1/doc

[xv] http://www.legis.state.la.us/lss/lss.asp?doc=108040

[xvi] http://www.law.cornell.edu/uscode/uscode42/usc_sec_42_00001396---p000-.html

[xvii] http://search.lasc.org/isysquery/227a17b3-f19a-435b-9919-2a0f5e0af0c4/1/doc/